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IS AN AUTOMOBILE A "DANGEROUS INSTRUMENT" WITHIN THE MEANING OF THE RULE HOLDING A MASTER LIABLE FOR ITS PERMITTED PERSONAL USE BY HIS SERVANT?

It is a rule of law well settled by authority that where a master permits his servant to use for his personal gratification or profit an instrument inherently dangerous, the master will be liable for the injuries negligently effected by the servant with such instrument.

Is an automobile a "dangerous instrument" within the rule just stated as will entail a liability on the owner of an automobile for injuries negligently inflicted by his chauffeur upon third persons while said chauffeur is in sole charge of the machine and using it for his own purposes with the consent of the owner. This was the issue in the recent case of Cunningham v. Castle, 111 N. Y. Supp. 1057, where the court reached the following conclusion: First the master would not be liable in such a case as the servant at the time was engaged upon his own and not his master's business, unless the automobile should be considered a "dangerous instrument;" second, that an automobile does not belong in the category of dangerous articles, the mere permission to use which will involve the owner in liability for the negligence of the licensee. On this latter point the court said: "For the purposes of this discussion it must be conceded that the chauffeur was not engaged in the master's business, but was on a private pleasure trip of his own and was using therein the master's automobile with the master's knowledge and consent. It is urged that the automobile was a dangerous instrumentality, and that having been intrusted to the chauffeur, the liability of the master still attached because of its dangerous character. The automobile is not necessarily a dangerous device. It is an ordinary vehicle of pleasure and business. It is more dangerous *per se* than a team of horses and a carriage, or a gun, or a sailboat, or a motor launch. There is no evidence that the chauffeur was not competent and qualified to run the machine. In fact, he was employed by the defendant for that very purpose. If a gamekeeper had borrowed his master's gun and had gone from the estate on a hunting expedition of his own and had negligently shot a man, would the master be responsible because he was using that instrumentality, which might be dangerous if carelessly used, the gun? I do not think that the question of the ignorance or consent of the master has any bearing whatever upon his liability. The fact that the servant has used the horses or the automobile without his consent has probative force upon the proposition as to whether or not the servant was engaged in the master's business and was acting within the scope of his employment. The question is whether he was or not. If without the knowledge of his master he took the car from the garage to a machine shop to have it fixed and an accident occurred, the fact of the want of knowledge on the master's part would not affect the liability, because the act would be within the scope of the servant's employment and in the prosecution of the master's business. If the chauffeur were granted a two-weeks' vacation and the master said to him: 'I am going off on a trip and will not need the machine; you may take it and use it for your own pleasure while I am gone,' I cannot think that he would be responsible for any negligence of the chauffeur during that period."

The dissenting opinion by Justice Houghton in the principal case contended that the character of the use to which the automobile might be put by a chauffeur was sufficient to render the owner liable for injuries to third persons where such use of his machine was with his express consent. Justice Houghton argued as follows: "While a powerful automobile may not, strictly speaking, be deemed a dangerous instrument, it may become so if recklessly driven. They are so dangerous that the legislature has prescribed that their owner-

ship must be registered, and the driver licensed, and that speed in different localities must be regulated. Motor Vehicle Law, Laws 1904, Chap. 538. The defendant recognized this when he instructed his servant to be careful on the trip which he permitted him to make. If a railroad official should loan a locomotive to one of the company's engineers for the purpose of hurriedly visiting a distant locality, it could hardly be said that the engineer alone would be liable for injuries inflicted upon third persons."

The weight of authority is with the decision of the court in the principal case that an automobile is not a dangerous instrument within the rule of law now under consideration. McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (U. S.) 1130; Jones v. Hoge (Wash.), 92 Pac. 433; Lewis v. Amorous (Ga.), 59 S. E. 338. In the last case cited the court facetiously remarked: "It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While by reason of the pay allotted to judges in this state, few, if any, of them have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil-disposed mules, and the like."

NOTES OF IMPORTANT DECISIONS.

COURTS—ORIGINAL JURISDICTION OF SUPREME COURTS LIMITED TO QUESTIONS PUBLICI JURIS AFFECTING THE SOVEREIGNTY OF THE STATE OR THE GENERAL WELFARE.—The statement of the proposition of law given as the subject heading of this annotation is rapidly becoming the prevailing rule, as we said it should so become in our exhaustive annotation on the subject of the original jurisdiction of Courts of Appeal in 67 Cent. L. J. 324. The latest authority to give absolute acceptance to this doctrine is the Supreme Court of North Dakota in the recent case of State v. Fabrick, 117 N. W. 860, where it was held that the sovereignty or franchises of the state being not directly affected by proceedings for the division of a county, the Supreme Court will not interfere by mandamus to control the action of the county commissioners except under "unusual circumstances." This is the exception so often stated by Courts of Appeals to which we called attention in the annotation above referred to.

In the principal case the court declared the general rule as follows: "Merely private rights are not enough on which to base an application for the issuance of original writs by this court. The rights of the public must appear to be directly affected. The matters to be litigated must not only be publici juris, but the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people must be affected. Before the court will, in the exercise of its original jurisdiction issue prerogative writs, there must be presented matters of such strictly public concern as involve the sovereign rights of the state, or its franchises or privileges. The often quoted statement of the rule as to the original jurisdiction of the Supreme Court to issue writs of a prerogative character, as given in Attorney General v. City of Eau Claire, 37 Wis. 400, is well expressed and clear: "To warrant the assertion of original jurisdiction here the interest of the state should be primary and proximate, not indirect or remote; peculiar, perhaps, to some subdivision of the state but affecting the state at large in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state in its sovereign character."

The principal case, however, was held to be one of the "exceptional" cases which do not come within the rule for the reason that unless the issue as to the proper submission of the question to be voted for at the 1908 election were determined on, this original hearing, the right to vote would be utterly lost for at least two years because of the necessary delays incident to the bringing of a suit through the ordinary channels of procedure. The court said on this point: "The matter of the division of a county is one of public importance to the people of the county. The statute gives the people a right to express a choice on that question. Inasmuch as the question must be voted on at the next succeeding election after the presentation of the petition to the commissioners, it is not improbable that delays or refusals by some official will cause the same situation in 1910 as now confronts

the petitioners. We are fully convinced that only matters of the gravest importance should be considered sufficient to warrant this court in issuing prerogative writs at the request of private relators. Nevertheless we deem the circumstances and conditions surrounding this case to show such a state of facts as to bring it within the exception to the general rule. By refusing to entertain the writ now, it is inevitable that a delay of two years will be occasioned. A delay for so long a period on a matter of this importance is a potent consideration in favor of taking jurisdiction. In view of the fact that an appeal to the Supreme Court can follow any decision of the district court in the case, we think the interests of justice demand that this court should act and dispose of the controversy now, and prevent further delay on a matter of such great consequence to the people of Ward county."

CONSTRUCTIVE CRIMES DEFINED.

The constitutional requirement of "due process of law," of course presupposes a "law" without which a conviction for crime could not be constitutional. In many ways and places I have endeavored to resurrect and revivify the old maxim, "Ubi jus incertum ibi jus nullum"—(where the law is uncertain there is no law). I have done this to the end that this maxim may be judicially declared to be a part of our constitutional conception of "law," as that word is used in the constitutional guarantee that no man shall be deprived of life, liberty or property, except by "due process of law."[1]

In the essays just referred to in the note I justified with considerable elaboration the proposition that in the United States no man can be punished for mere constructive offenses. I have gone further and have attempted to formulate a statement of the nature of law as viewed in the scientific aspect, in contradistinction to that arbitrary power which punishes constructive offenses, and I have undertaken to make a comprehensive discussion as to what is a constructive offense in relation to "due process of law." Here I will only undertake to summarize those conclusions, already justified in various ways.

Constructive Crimes Classified.—Constructive offenses naturally divide into two general classes. In the first of these the more direct responsibility for the prohibited constructions rests with the courts, and arises from the judicial engraftments made upon legislative enactments, and the second class includes those where the more direct responsibility for the evil primarily rests with the legislature for having attempted to construct a wrong, by penalizing conduct not in itself injurious, nor of injurious tendencies according to any known laws of the physical universe. These two general classes of constructive crime readily lend themselves to a further subdivision, according to the various conditions which conduce to such baneful punishments for mere constructive wrongs. These different sources of such error will now be pointed out with a little more system and elaboration, and it is believed that the following statements are justified by, and generalize all, that is included in the discussion and the authorities cited in the several articles above referred to. In what follows it will be necessary for the clarifying of our vision to subdivide still further the two general classes of constructive offenses, above referred to.

Judicial Legislation Under Pretense of Interpretation.—The first class of constructive offenses is best understood. Here the act under investigation is one which under any of the tests prescribed hereafter, may properly be penalized, but it is not within the plain letter of the prohibitive statute because the statutory tests of criminality, though certain in meaning and covering acts of the same general character, manifestly do not specifically include the con-

(1) For my discussions thereof see: "The Scientific Aspect of 'Due Process of Law,'" Am. Law Review, June 1908. "Concerning Uncertainty and 'Due Process of Law,'" Cent. Law Jour., Jan. 3, 1908. "The Historical Interpretation of 'Law,'" The Albany Law Jour., April, 1908. "Due Process of Law in Relation to Statutory Uncertainty and Constructive Offenses." N. Y. 1908, Pub. by The Free Speech League, 120 Lexington ave., N. Y. (This last booklet contains the three foregoing essays, and much more similar matter besides.)

duct under investigation. In such a case the judicial enlargement of the field plainly marked out by the statute is so universally recognized as improper, because judicial legislation, and therefore within the prohibited constructive offenses, as to need no argumentative support. Indeed, all our judicial rules for the strict construction of criminal statutes are founded upon the necessity of precluding judges from creating law.

The second class of constructive offenses is less perfectly understood. Here the act under investigation is again one which, under any of the tests prescribed hereafter, may properly be penalized, but the statutory language is ambiguous in its specification of the criteria of guilt. Such statutes, often seduce judges into an abuse of their power by a misapplication of rules of construction. Where the words descriptive of the crime are ambiguous, (open to several interpretations, some or all of which meanings, taken separately, are very certain in their application to all specific facts), it is erroneously assumed by many courts that it is an exercise of the judicial function of statutory interpretation to select that one among all the possible meanings of the statute which is to be enforced. I do not conceive it so. The judicially selected interpretation may not be the one which the legislature intended to enact. Certainly it has not received the specific sanction of the legislative branch of the government, any more than every other possible interpretation, and the only conduct which can with certainty be known to be within the legislative prohibition (that is, within *the law*) is those acts which are clearly within every possible meaning of the statute. If this rule has not been always observed in the matter of ambiguous statutes, it is because judges have not seen clearly the true relation between such ambiguity and *the law*, as a scientist must view it, nor the distinction between judicial legislation and judicial interpretation.

The third class of these prohibited constructive offenses is those where definitive description of the crime is wholly wanting (uncertainty as distinguished from mere ambiguity) because there is total absence of any certain, clear, universal and decisive tests of criminality. Then we have a case for the application of the old maxim: "Where the law is uncertain there is no law." In such a case if the court should supply the tests of criminality, so indispensable to the enforcement of every statute, those tests would not have the sanction of the legislative branch of the government, and therefore could not be *the law*, in any criminal case. Supplying these tests, or criteria of guilt, is therefore clearly a matter of judicial legislation, by means of statutory interpolation, as distinguished from interpretation, and punishment thereunder is punishment for a constructive offense, and not due process of law.

If in a criminal case a court should undertake to enforce upon any person a judgment which did not conform to general, uniform and certain rules of conduct having an exact, verbally-formulated existence, which is wholly created by the legislative department, and therefore existing outside the mere will of the court, and well known or easily accessible to all prior to the inception of the cause of action then before the court—I say, if a court should undertake to enforce anything different from such a law, it would not be enforcing *the law* at all, and to submit to such penalties would be submission to a government by the arbitrary and despotic will of the judiciary, and not in any sense would this be a government according to *law*, and this must always be the case where the statutory criteria of guilt are uncertain. Criminal punishment under such circumstances would be punishment for constructive crimes, and not due process of law.

Legislative Penalizing of Mere Constructive Injuries.—Fourth: It follows from the fact that human justice and a secular state, can only deal with material factors, that an offense to be real, and not merely construc-

tive, must be conditioned upon a demonstrable and ascertained material injury, or upon the imminent danger of such, the existence of which danger is determined by the known laws of the physical universe. Our constitution, both in its guarantee of freedom of speech and press, and in its guarantee of due process of law (as we must understand *the law*, according to the scientific view-point), precludes the construction of mere psychologic crimes. The offenses which are based only upon ideas expressed or otherwise, such as constructive treason, witchcraft, and heresy, either religious or ethical, and all kindred psychologic or other constructive crimes, are prohibited, because the very nature of *the law* whose supremacy and processes our constitution guarantees, is such that American legislators cannot be permitted to predicate crime upon mere psychologic factors. Manifestly this does not preclude punishment when these psychologic factors have ceased to be merely such, by having resulted in actual material injury as distinguished from constructive and speculative injury; for example, it does not preclude punishment in cases of personal libel, which has resulted in material injury or where the uttered opinion has resulted in actual crime. Under such circumstances as to make one an accessory before the fact, or as to prove a conspiracy to secure its commission.

Furthermore, if the state should be permitted to penalize an act which is not an essential element in doing violence to that natural justice which can deal only with material and physical factors, such a statute could not be one enacted in the furtherance of the governmental purpose to establish justice (material justice) and therefore such a law could not be within the legitimate province of such a government as we profess to maintain. Furthermore, such a statute, penalizing an act which is not an essential element in violating natural justice, must in itself be the creation of an injustice—that is, it must in itself and from its very nature, authorize an invasion of liberty, unwarranted by any necessity for defending natural justice, or maintaining the greatest liberty consistent with equality of liberty, and therefore the enforcement of such a statute would be the deprivation of liberty without due process of *law*, as we must understand "law" if we view it in the scientific sense. I conclude that every such statute as I have last hereinabove described is also an attempt to punish for a constructive offense—is a violation of our constitutional guarantee of due process of law.

Difficulty in the Application.—It hardly seems possible that there could be much conflict of opinion about the foregoing generalities. The differences of opinion I apprehend will arise chiefly when we come to make deductions therefrom for application to some particular statute, and the result comes in conflict with our moral sentimentalism. Under such circumstances we are all predisposed to error, because our emotions will necessarily blur our intellectual insight as to the difference between certainty in the very words of the statute, and a strong feeling certitude within us that the legislature must have means to prohibit exactly what *we feel* that they ought to have prohibited. Thus moved by our feelings, just to the extent that they are intense, we will be certain to read our feeling-convictions into the statutes, which often by reason of their very uncertainty, readily lend themselves to this dangerous and almost inevitable evil, of judicial penal-legislation. If this evil can be avoided it will only be because our intellectual development is of that superior order which dominates the feelings, without ever being overcome by them, and which at the same time enables us to possess an illuminated view of the point of contact and division between judicial (so-called) statutory construction, and a judicial usurpation of the legislative function, under the guise of statutory interpretation. These considerations seem to make it desirable that the foregoing principles be more elaborately restated with some special attention to the factors which necessarily imply unconstitu-

tional uncertainty and form the tests by which statutes will be adjudged to be uncertain, and consequently a nullity. Thus we will still further clarify our intellect and fortify ourselves against the dangerous, liberty-destroying tendency to punish for constructive offenses.

Penalizing Abstractions and Emotions.—If the legislative verbiage in a criminal enactment is so involved as to make its significance doubtful, or if the offense is bunglingly described by words which symbolize and generalize only a subjective (emotional) state, associated in the minds of different persons with a variety of mere, peculiarly personal, abstractions incapable of accurate, concrete definition, such as is uniformly applicable to every conceivable case, and decisive beyond all speculative doubt, then in either event, that enactment must be declared a nullity, because "where the law is uncertain there is no law." If courts were allowed to decide which of possible or conflicting descriptions is to be made effective and which annulled, or are allowed to create the criteria of guilt, when the legislature has failed to do so, this would be judicial legislation, because the legislature having furnished no exact material for definition, the courts can only declare that to be the law which its judges, in the exercise of legislative discretion, believe ought to be the law, (instead of deriving that legislative intent exclusively by deductions made from the legislative language); and therefore read it into the statutes and dogmatically declare the judge's will to have been the legislative intent.

The judicial power over criminal statutes must be limited to a mere redeclaration, or restatement of that which, to every intelligent person, is already definitely and clearly manifest from the actual words of the enactment, and from these alone. If it requires more than this to make the statute enforcible, or applicable to a particular case, then the statute is a nullity under the maxim: "Where the law is uncertain there is no law." To do less than this, for every word used in the enactment, or to do more by importing and engrafting into a criminal statute facts and phrases not actually placed there by the legislative body, is again a judicial usurpation of the power to enact criminal legislation.

It follows that if those words, which alone are actually employed in the statute, do not unavoidably import such an exact definition, that every man of average intelligence, *by the use of the statutory definition alone* can determine with mathematical certainty, whether a particular act is a crime, (or a particular book is obscene) then the legislative body has failed to create a criminal "law," and the court being without legislative power, has nothing to execute, but must declare the pretended statute a nullity, because, "where the law is uncertain there is no law."

Statutory Words Must Symbolize Definite and Uniform Concepts.—Not quite identical with the foregoing proposition is this truism: The power of courts is limited to deductions made from the legislative words; that is, the general concept symbolized by the statutory words may be made concrete to determine if the specific act is necessarily included in the legislative general conception, as that is exclusively revealed in the legislative language: In other words, the court cannot create such a concept where the legislative word-symbols do not stand for definite concepts. That again would be judicial legislation, not interpretation, because, "where the law is uncertain there is no law," and a law which requires this to make it effective is void.

If courts can be credited with any power to construe penal statutes, the ambiguity which furnishes the occasion and subject-matter of construction, must be found solely in the word-symbols used in the criminal statutes, and not in the exercise of judicial legislative-power, under the guise of interpreting the indefinable nature of that which the legislative words in fact do symbolize. Any other rule would authorize arbitrary *ex post facto* judicial legislation and punishment, and where the legislative word-symbols do not stand for definite concepts,

the enactment is a nullity because "where the law is uncertain there is no law."

To clarify our minds let this be restated in another way. When the word-symbols descriptive of the crime do not stand for definite or concrete concepts, nor any sense-perceived, objective quality or activity of matter, of present or past existence, but represents to each individual, only a subjective relation between his own purely personal experience, or the abstractions made from them, and his purely personal emotions of approval or disapproval, then the words used to describe this subjective condition, because of its abstractions and emotional element, always making it personal and individual, must always elude accuracy of definition, and the law is void "because where the law is uncertain there is no law."

Whenever we neglect the requirement that every crime must be predicated upon some actual sense-perceivable and proven material injury, or the imminent danger of such determined to be imminent by the known laws of the physical universe, and therefore accurately definable and so defined in the statute; I say, whenever we abandon these requirements then we are condemning men on mere metaphysical speculations about unrealized psychologic tendencies, or according to the personal ethical sentimentalizing, whim, caprice, malice, etc., etc., on the part of those charged with the execution of the law, and thus the judge arrogates to himself the role of legislator, and under such enactments convictions are never secured according to the uniform express authority of any statute, and all such convictions inflict punishment, for mere constructive injuries, and are an unconstitutional deprivation of liberty and property because not "due process of law." This error, I repeat, is one easily made if we are but careless about the proper different attitudes of mind which should characterize our outlook upon penal statutes and those of a civil nature which only declare and enforce natural justice; or if our vision is clouded as to the difference between deductions made from the statutory phrases and our feeling-convictions, read into statutes, made hospitable thereto because uncertain, and therefore containing little or no limitation upon the reading-in process.

Under our system (especially that of the Federal Criminal law,) where legislative power is definitely placed, accurately limited, and incapable of transference to a jury, star-chamber, or any other department of government, and where in addition *ex post facto* laws are prohibited, it is manifest that the maxim against uncertainty in statutes must be treated as an inseparable, inalienable and inherent part of that liberty of the citizens which is guaranteed by every American constitution. Without certainty before the fact, as to what is the law in relation to it, there can be no such thing as "due process of law" in any conviction. If the criminal statute is uncertain, then courts and juries become legislators after the fact, if any enforcement of the statute is had.

It follows that if any American legislative body should create a crime without defining it, such enactment would be a nullity. Should an attempt be made to penalize the commission of "screw-loos-ibus," without defining the word, such a law would be unenforcible and void. It is intolerable that courts should resort to current history, and therefrom deduce meaning to be read into a penal statute whose words are devoid of all definiteness of meaning. By such a process the court might conclude that a legislature by "screw-loos-ibus" intended to penalize certain unpopular practices of christian scientists. If courts may thus speculate inductively from current history, personal emotions and prejudices, and read the result into penal statutes by dogmatically asserting that this or that was the legislative intent, then we have re-established judicial despotism. In the absence of a generally known and *accurately definable* meaning for the word, an enforcement of the law against "screw-loos-ibus" would necessarily involve the exercise of legislative power, by the court or

jury charged with its execution, and this enactment, by an unauthorized delegation of legislative power, must be specially made at each trial to cover only the acts then under investigation, and must always *be ex post facto*. For each of these reasons a law which in its practical administration necessarily involves such objections must be judicially annulled.

If a criminal law is so vague as to need interpretation, then it should be declared a nullity for uncertainty. Any other course necessarily involves on the part of the interpreting judge that as between all possible meanings he exercise his own legislative discretion and read the result into the legislative intent and phraseology. If the words to be interpreted symbolize emotions as their only element of unification, and therefore are incapable of accurate general definition, or if the materials for a judgment as to the applicability of the law to every conceivable case, are varying in different persons, then to allow judges or juries to interpret or apply such a doubtful statute is to admit their authority to enforce an *ex post facto* criteria of guilt; which is not public nor general, but of private origin in the court, and particular for each defendant.

These foregoing speculations suggest all that has occurred to me by way of specifying in general terms the principal sources of that outrageous remnant of absolutism, which so often results, even in our time and country, in the damnable practice of punishing men for mere constructive offenses. The motive for these wrongs is usually a stupid moral sentimentalism and self-righteousness, and often finding its roots in religious superstitions of the past. The remedy can only be found in securing judges whose intellectual development is such as to make them true scientists of the law, and who with clear intellectual insight shall combine that moral courage which will make them dare to resist the "moral" rant of a politically potent but intellectually bankrupt professional reformers. I am sure there are such judges, and that with persistence and diligence they can be found.

The Standard of Certainty.—The standard of certainty and constitutionality is that a criminal statute to constitute "due process of law," must define the crime in terms so plain, and simple, as to be within the comprehension of the ordinary citizen, and so exact in meaning as to leave in him no reasonable doubt as to what is prohibited. Those qualities of generality, uniformity, and certainty, must arise as an unavoidable necessity out of the very letter of the definition framed by the law-enacting power, and not come as an incidental result, from an accidental uniformity in the exercise, by courts, of an unconstitutionally delegated legislative discretion. If a statute defining a crime is not self-explanatory, but needs interpretation, or the interpolation of words or tests to insure certainty of meaning in the criteria of guilt, then it is not *the law* of the land, because no such judicial test of criminality has ever received the necessary sanction of the three separate branches of legislative power, whose members alone are authorized and sworn to define crimes and ordain their punishment. Laws defining crimes are required to be made by the law-making branch of government because of the necessity for limiting and destroying arbitrariness and judicial discretion in such matters. That is what we mean when we say ours is a government by *laws*, and not by men. It follows that it is not enough that uniformity and certainty shall come as the product of judicial discretion, since "law" is necessary for the very purpose of destroying such discretion in determining what is punishable.

An Illustrative Application.—Let us briefly apply the foregoing test of constitutionality to our various laws against "obscene indecent, filthy or disgusting" literature or art. To constitute a valid criminal law the statute under consideration must so precisely define the distinguishing characteristics of the prohibited degree of "obscenity" that guilt may be accurately

and without doubt ascertained by taking the statutory description of the penalized qualities and solely by the tests of obscenity therein prescribed determine the existence of the prescribed criminal qualities in the physical attributes inherent in the printed page. Judicial tests of "obscenity" cannot be read into the statutory words. Nor can official or judicial speculations (of a character not calculated to discover such definitely penalized physical qualities in the book) be permitted, so long as they deal only with the mere unrealized psychologic potentiality, for influencing in the future some mere hypothetical person. Such speculative psychologic tendencies are never found with certainty in any book, but are read into it, with all the uncertainty of the *a priori* method, as an excuse for a verdict of guilty. Even if the legislative body attempted to authorize such a procedure it would be a nullity, under the maxim, "Where the law is uncertain there is no law." Therefore such procedure cannot be "due process of law." An unrealized psychologic tendency cannot be made the differential test of criminality, although for the sake of the argument we admitted that such tendency may properly appeal to the legislative discretion, and may properly result in penal laws wherein the statutes and not the courts, specify the tests, definite and certain, by which to determine what it is that is deemed to possess the criminal degree of such dangerous tendency.

It is for the legislature definitely and precisely to prescribe all the criteria of guilt by which to determine the existence of that which is prohibited, because of its immoral tendency, and no mere seeming necessity nor even by express language, and much less by vague implication derived from mere uncertainty, can it delegate to the judge or jury a legislative discretion for condemning, after the facts, according to its own arbitrary guess about the problematical psychological influence and a consequent immoral tendency of a book. For the foregoing reason all laws against "obscene, indecent, filthy or disgusting" literature or art" are void, as not constituting "due process of law."

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RAILROADS—SAFETY APPLIANCE ACT—CONSTRUCTION OF.

UNITED STATES v. ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

United States Circuit Court of Appeals, Eighth Circuit, August 22, 1908.

The safety appliance law of Congress, in the situations in which it is applicable, imposes upon a railway company an absolute duty to maintain the prescribed coupling appliances in operative condition, and is not satisfied by the exercise of reasonable care to that end.

VAN DEVANTER, Circuit Judge. This writ of error challenges a judgment for the defendant in a civil action to recover a penalty for an alleged violation of the safety appliance law of Congress embodied in Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), Act April 1, 1896, c. 87, 29 Stat. 85, and Act March 2, 1903, c. 976, 32 Stat. 943 (U. S. Comp. St. Supp. 1907, p. 885). Stripped of matters about which there is no controversy here, the violation charged consisted in hauling a car, in the usual course of transportation, when one of the couplers thereon was broken and inoperative, so that it could not be coupled or uncoupled without the necessity of a man going between the ends of the cars. The trial was to a jury, and the single question presented to us is whether or not the duty of the defendant, in respect of the maintenance of the coupler in an operative condition, was correctly stated in the portion of the court's charge, which reads: "The act, however, must necessarily have a reasonable construction. These couplings will get out of repair, and it takes time to repair them. It takes time to discover whether or not they are out of repair. It is the duty of the railway companies to use prudence and the ordinary diligence of a business man, keeping in view the purposes of the act, to keep these couplings in repair. * * * And it is for you to determine in this case whether or not the defendant used reasonable care in ascertaining whether the car was in good repair, and then, again, whether the defendant used reasonable care in putting the coupler in good repair, after it ascertained that it was out of repair. If you find that it did use reasonable care in both instances, then it is not liable, and you should return a verdict in favor of the defendant; otherwise, you should find for the United States."

Applying to the evidence the law as so interpreted, the jury returned a verdict for the defendant, which the court declined to disturb upon a motion for a new trial. United States v. Atchison, etc., Ry., (D. C.), 150 Fed. 442. That the interpretation of this law of Congress has been attended with difficulty is attested by many varying opinions in the reported cases, and that there are considerations tending to sustain the construction placed upon it by the District Court is attested by the opinion rendered upon the motion for a new trial and by the sustaining opinions in other cases, notably St. Louis & S. F. Ry. Co. v. Delk (C. C. A.) 158 Fed. 931; but, as we read the opinion of the Supreme Court in the more recent case of St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. ——, s. c. 71 Ark. 445, 78 S. W. 220; 83 Ark. 591, 98 S. W. 959, it is now authoritatively settled that the duty of the railway company in situations where the congressional law is applicable is not that of exercising reasonable care in maintaining the prescribed safety appliance in operative condition, but is absolute. In that case the common-law rules in respect of the exercise of reasonable care by the master and of the non-liability of the master for the negligence of a fellow servant were invoked by the railway company, and were held by the court to be superseded by the statute; it being said in that connection (page 294 of 210 U. S., page 620 of 28 Sup. Ct. [52 L. Ed.,——]): "In deciding the questions thus raised, upon which the courts have differed (St. Louis & S. F. Ry. v. Delk [C. C. A.] 158 Fed. 931), we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employees reasonably safe tools, machinery, and appliances, or consider when or how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is prescribed. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just."

While the defective appliance in that case was a drawbar, and not a coupler, and the action was one to recover damages for the death of an employee, and not a penalty, we perceive nothing in these differences which distinguishes that case from this. As respects the nature of the duty placed upon the railway company, section 5, relating to drawbars, is the same as section 2, relating to couplers, and section 6, relating to the penalty, is expressed in terms which embrace every violation of any provision of the preceding sections. Indeed, a survey of the entire statute leaves no room to doubt that all violations thereof are put in the same category, and that whatever properly would be deemed a violation in an action to recover for personal injuries is to be deemed equally a violation in an action to recover a penalty.

Because, in view of the later decision in the Taylor Case, the instruction before quoted did not embody a correct statement of the law, the judgment is reversed with a direction to grant a new trial.

NOTE.—*Extent of Railroad's Liability for Failure to Comply with Provisions of the Federal Safety Appliance Act.*—Many difficult questions have arisen concerning the proper construction of what is known as the safety appliance act, requiring railroads to equip all their rolling stock with automatic couplers and continuous brakes.

Liberal Versus Strict Construction.—While this statute is penal and in derogation of the common law, it is not to be construed so strictly as to defeat the obvious intention of Congress as found in the language actually used according to its true and obvious meaning. Johnson v. Southern Pacific Co., 196 U. S. 1. Or in other words, a statute such as this, is to be construed so as to prevent the mischief and advance the remedy so far as the words fairly permit. Chicago, etc., R. R. v. Voelker, 129 Fed. 522.

But in the case of United States v. Illinois Central R. R., 156 Fed. 182, the court held that the safety appliance act was a criminal statute and is to be construed as such and in suits by the government to inflict the penalty thereunder the offense must be proven beyond a reasonable doubt. It would seem, however, that in view of a recent decision of the supreme court (Taylor Case, 210 U. S. 281), this holding is erroneous.

The Question of Interstate Commerce.—What cars are engaged in interstate commerce, making necessary the equipment required by statute? The Supreme Court of the United States has held that a dining-car regularly engaged in interstate traffic does not cease to be so when waiting for the train to make the next trip. The argument here is that an "empty" or "idle" car standing in some "local" yard is not to be measured as to its interstate character by the same standards as determine the interstate commerce character of ordinary merchandise (116 U. S. 517), but a presumption of the interstate character of cars used by interstate carriers follows cars "used in moving interstate commerce, which have stopped temporarily in making its trip between two points in different

states." Johnson v. Southern Pacific Co., 196 U. S. 1. See also Voelker v. Railway Co., 116 Fed. 867, 70 L. R. A. 264, where the language of Justice Shiras in arguing that "empty" cars are within the meaning of the statute is specially quoted with approval by the supreme court in the Johnson case.

Where a car loaded with lumber and shipped from another state had not been delivered to the consignee at the time it was stopped in a railroad yard at destination and placed on a sidetrack for repairs to the automatic coupler, the stoppage in the yard was an incident to the transportation, so that the car was still engaged in interstate commerce within the meaning of the safety appliance act. St. Louis & San Francisco R. R. Co. v. Delk, 158 Fed. 931.

So also it has been held that the provision of the safety appliance act applies to a car designed for interstate traffic, though at the time being hauled "empty." Voelker v. Railroad Co., 116 Fed. 867. See also U. S. v. Ill. Cent. Ry. Co., 156 Fed. 182; U. S. v. Railroad, 162 Fed. 185. It is also held that a car destined for a distant point in another state is still in interstate commerce though transit may be temporarily suspended. Chicago, etc., R. R. v. Walker, 129 Fed. 522.

What are "Cars" Within the Meaning of the Act?—It has been held that locomotive engines are included by the words "any car" contained in the second section of the act. Johnson v. Southern Pacific Co., 196 U. S. 1. The argument there is that although locomotives are also required by the first section of the act to be equipped with power driving wheel brakes, the rule that the expression of one thing excludes others does not apply, inasmuch as there was a special reason for that requirement and in addition the same necessity for automatic couplers existed as to them as in respect to other cars.

Style and Character of Couplings Used.—It has been held that the equipment of cars with automatic couplers which will not automatically couple with each other so as to render it unnecessary for men to go between the cars to couple and uncouple is not a compliance with the law. Johnson v. Southern Pacific Co., 196 U. S. 1. See also: U. S. v. L. & N. Railroad, 162 Fed. 185. And it has also been held that this test, to-wit, whether the person operating the coupler is required to go between the ends of the cars, applies to the act of coupling as well as that of uncoupling. Chicago, Milwaukee & St. Paul R. R. Co. v. Voelker, 129 Fed. 522. In this last case the coupler had become so defective that the lever would not lift the pin from the socket and the knuckle could not be drawn open by leaning toward the coupler and using one hand, but required the presence of the operator's entire body between the ends of the cars.

It had also been held that under the act of 1893, requiring draw-bars, when cars are empty, to be 34½ inches above the rails, with a maximum variation, loaded or unloaded, in the height downwards of 3 inches, does not require that the variation shall be proportioned to the loads or that a fully loaded car shall exhaust the entire variation. St. Louis, etc., R. R. v. Taylor, 210 U. S. 281.

It has been held that each car is to be considered separately and shall each be equipped with automatic couplers in operative condition at both ends. U. S. v. Philadelphia, etc., R. R., 160 Fed. 696.

Subsequent Care, Repair and Operation, of Couplings.—Some difference of opinion exists on this phase of the question. It has been held that while the safety appliance act imposes on the carrier the absolute duty of equipping its cars with automatic couplers in the first instance, and thereafter keep them so equipped, the carrier is only required to use reasonable care, after the cars have been so equipped, to keep such couplers in repair. St. Louis & San Francisco R. R. Co. v. Delk, 158 Fed. 931. To same effect: Missouri, etc., R. R. v. Brinkmeier (Kans.), 93 Pac. 621.

But it has also been held that this duty is an absolute one and that it is not a defense that defendant exercised reasonable care and diligence to keep the coupling apparatus on its cars in repair. United States v. Southern Railway Co., 135 Fed. 122. It was further held in this case that, placing an "M. C. B." defect card upon a car, and noting on such car defects forbidden by the safety appliance act which is notice to all connecting lines that the defendant sent the car out defective, and that other lines using the car would not have to account to defendant for the defects noted is a deliberate violation of the statute and a defiance of the law.

The case of United States v. Atchison, Topeka & Santa Fe Ry. Co., 150 Fed. 442, takes the opposite position, holds that this act being penal should not be strictly construed against the defendant and that a mere failure of defendant railroad company's inspectors on first inspecting the car before delivering it to a connecting carrier to discover that the chain attached to the lever by which the automatic coupler was broken, the same having been discovered and repaired on a subsequent inspection before delivery to the connecting carrier, did not constitute a violation of the act.

It is well to distinguish the last two cases, where the United States sues to recover the penalty provided for failure to keep couplers on cars used in interstate traffic in repair, and cases like the Voelker case, which is a suit for personal injuries occasioned by the use of such defective couplers. In the first case no one is injured and the courts seem inclined not to impose the duty in such a case as an absolute one, while in the second class of cases the fact that the cause of the injury was the defective coupler is sufficient to hold the defendant liable.

The rule is otherwise stated as follows: Where an automatic coupler is out of repair for a length of time reasonably sufficient to have it repaired, the railroad is absolutely liable for all injuries which may occur. Elmore v. Railroad, 130 N. Car. 506. Otherwise, not. United States v. Ill. Cent. Ry. Co., 156 Fed. 182.

It would seem, however, that this question has been settled by the supreme court in the recent case of St. Louis, etc., R. R. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, where it was distinctly held that the safety appliance act supplants the common law rule of reasonable care on the part of the employer as to providing the appliances defined and specified therein, and imposes on interstate carriers an absolute duty, under which duty the defense of reasonable care is unavailable. See also to same effect: U. S. v. Railroad, 162 Fed. 405.

Where cars become defective while moving interstate traffic, the railroad must use reasonable diligence to discover the defects and repair same

at once or at the nearest point where it can be done. U. S. v. Great Western Ry. Co., 162 Fed. 1052. It has been held that where there has been a "rest" for one hour, the railroad is negligent in again moving the car without repairing coupler. United States v. Philadelphia, etc., R. R., 160 Fed. 696.

In regard to the operation of proper couplings it has been held that the safety appliance act cannot be construed so as to require that the equipment shall in fact be efficiently operated by those in charge of the train.

Proximate Cause, Assumption of Risk and Other Defenses.—It has been held that the failure to equip a car with a coupler, coupling automatically, by reason of which a car coupler was obliged to go between the cars, is a proximate cause of the accident, though the cars were forced together by the negligent kicking of other cars against them. Voelker v. Railroad, 116 Fed. 867.

On the question of assumption of risk it is to be noted that the act itself (sec. 8), specially provides that one injured by a defective coupler shall not be deemed to have assumed the risk though he continue in the employment of the railroad company after knowledge of the use of such defective couplers. Under this section it has been held that a switchman engaged in handling a freight car having a defective coupler, on a track principally used for handling freight trains, though sometimes used to handle cars in need of repairs, did not assume the risk arising from the defect in the coupler; the car not having been marked or isolated as one in bad repair, and its movement at the time not being with a view to its isolation or repair. Chicago, etc., R. R. v. Voelker, 129 Fed. 522.

In regard to the defense of contributory negligence, it is to be observed that the failure to equip or keep in repair automatic couplers on all rolling stock amounts to a continuing negligence on the part of the railroad company and that therefore there can be no contributory negligence which will discharge its liability to an employee injured while coupling such defective cars. Elmore v. Railroad, 130 N. Car. 506.

CORRESPONDENCE.

SUPERIOR RIGHT OF PARENT TO CUSTODY OF MINOR CHILD.

Editor of the Central Law Journal:

Apropos of your editorial on the "Superior Right of a Parent to the Custody of a Minor Child" found in your issue of the 11th instant, let me refer your readers to an interesting and comprehensive discussion of the whole subject by the Supreme Court of Wisconsin, reported in the case of Markwell v. Pereles and found in the 95 Wis. 406. In that case it appeared that the father was of apparent ample financial ability to support his child. And the fact that the father was of a cold and unsympathetic nature could not, in the mind of the court, operate to deny him the custody of his child.

The relation of parent and child with particular reference to the custody of the child, is treated exhaustively. So much so that the case must be regarded as a leading one on the subject. The late Mr. Justice Pinney wrote the decision for the court, which was unanimous.

Very truly yours,

DUANE MOWRY.

Milwaukee, Wis.

JETSAM AND FLOTSAM.

WHERE THE CAUSE OF ACTION RETURNS TO LIFE.

Through the courtesy of one of our esteemed correspondents, we publish below a motion to dismiss a suit on an insurance policy filed November 17, 1908, in the District Court of Wapello County, Iowa, to-wit:

Comes now Smith & Lewis, attorneys for plaintiff, and shows to the court that this is an action upon a life insurance policy based upon the belief that the assured, Andrew Olson, was dead. As shown in the petition he had disappeared from Ottumwa some thirteen years ago, and for the past eight or ten years he has not been heard from and his whereabouts unknown; diligent search had been made for him without results, and so plaintiff concluded that he had passed to that bourne whence no traveler returns. She caused letters of administration to issue upon his estate as dead and brought this action, but the said Andrew Olson is not dead at all, though this court has solemnly recorded that he was dead. In short, the said Andrew has returned from the said bourne and is here on earth in the flesh, and so far as we can see he is likely to continue in this vale of tears for many moons to come. Under these circumstances it would be hard for us to convince a jury that the plaintiff should recover. In fact, she does not want to recover. To confess, she is the first client that we have ever had to sincerely rejoice at defeat. And now we ask leave of court to dismiss this case without prejudice to our rights to reinstate at some future time, should that time ever come when we are cock sure that Andy is dead.

SMITH & LEWIS.

HUMOR OF THE LAW.

Judge—Mr. State's Attorney, before you can introduce this witness you must show the loss of the record.

State's Attorney—I presume your honor was aware of the fact that the records of Marion County were burned.

Judge—As a private citizen I do know the fact, but as the court I do not, and you must put the proof of the fact into your case.

State's Attorney—Well, your honor, it strikes me a little singular that your honor knows something off the bench, and don't know anything on it.

"What are they moving the church for?"

"Well, stranger, I'm mayor of these diggin's, an' I'm fer law enforcement. We've got an ordinance what says no saloon shall be nearer than three hundred feet from a church. I give 'em three days to move the church."

WEEKLY DIGEST.

Weekly Digest of ALL Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Appeal and Error**—Excessive Damages.—Where the damages for personal injuries are excessive, the court may reverse unless plaintiff will stipulate to reduce the verdict.—Weinert v. Merchants' & Shippers' Warehouse Co., 112 N. Y. Supp. 123.

2.——Hypothetical Questions.—Exclusion of hypothetical questions to expert witness held to be presumed to be prejudicial error, where both parties below assumed that the answer would be favorable to the party asking the question.—Ross v. Schrieves, Mass., 85 N. E. Rep. 468.

3.——Offer of Proof.—Error cannot be predicated on the refusal of the court to permit witnesses to answer as to particular matter, where no offer was made to show what the witnesses would answer.—St. Louis Southwestern Ry. Co. v. Myzell, Ark., 112 S. W. Rep. 203.

4.——Suspensive Appeal.—Where a suspensive appeal is allowed from a judgment for money, and it is dismissed for failure to furnish bond, no appeal from the judgment of dismissal can suspend the execution of the judgment originally appealed from.—Reynolds v. Egan, La., 47 So. Rep. 371.

5.——Verdicts.—Where the trial court approves the amount of a verdict, the appellate court will not disturb it if not grossly disproportionate to the injury.—Gerhart v. Metropolitan St. Ry. Co., Mo., 112 S. W. Rep. 12.

6. **Assignment for Benefit of Creditors**—Sale by Trustees.—That trustees under a deed and assignment for the benefit of creditors did not advertise the property held no ground for avoiding their sale.—Whitman v. McIntyre, Mass., 85 N. E. Rep. 426.

7. **Attorney and Client**—Compensation for Services Rendered.—If an attorney's compensation is stipulated, and he without just cause abandons his client before the proceeding for which he was employed has been conduced to a termination, he forfeits his right to compensation for services rendered.—Young v. Lanznar, Mo., 112 S. W. Rep. 17.

8. **Bailment**—Gratuitous Bailment.—A deposit of $1,000, made by plaintiff with his brother, placed in an envelope marked as plaintiff's property and put in a safe is a gratuitous bailment, entailing no liability except for gross negligence.—Stevens v. Stevens, Mo., 112 S. W. Rep. 35.

9. **Bankruptcy**—Agreements Made Before Four Months Period.—The fact that a transfer of property by a bankrupt to a creditor to be applied on an antecedent debt made within four months prior to the bankruptcy, was pursuant to an agreement made before the four-month period, will not prevent its recovery by his trustee.—Vitzthum v. Large, U. S. D. C., N. D. N. Y., 162 Fed. Rep. 685.

10.——Concealment of Property.—The omission by a bankrupt from his schedules, under advice of counsel, of property claimed by another and the ownership of which was at least doubtful, cannot be held to be such a fraudulent concealment as to bar his right to a discharge.—In re Alleman, U. S. D. C., N. D. Pa., 162 Fed. Rep. 693.

11.——Discharge.—A discharge in bankruptcy not pleaded as a defense in a suit involving liabilities cut off by the discharge held not a defense to the execution sale under a judgment rendered in such suit.—Stone v. Schneider-Davis Co., Tex., 112 S. W. Rep. 133.

12.——Exemptions.—Under Code Civ. Proc. Neb. sec. 530, a bankrupt who is a dealer in eggs and poultry is entitled to hold as exempt as tools and instruments of his business a horse, harness, and wagon used in gathering such produce, and the appliances necessary to be used in conducting his business.—In re Conley, U. S. D. C., D. Neb., 162 Fed. Rep. 806.

13.——Exemptions.—Furniture, such as dishes, counters, stools, ranges, and the like, used in conducting a restaurant, is not exempt from forced sale under Rev. St. 1895, art. 2397, subd. 3, exempting all "tools, apparatus and books, belonging to any trade or profession."—Stone v. Schneider-Davis Co., Tex., 112 S. W. Rep. 133.

14.——Frivolous Appeal.—A second appeal in a bankruptcy proceeding, raising the same question determined in a former appeal, would be dismissed as frivolous.—In re Kehler, U. S. C. C. of App., Second Circuit, 162 Fed. Rep. 674.

15.——Involuntary Proceedings.—A court of bankruptcy held to have jurisdiction to proceed with the hearing of a petition in involuntary bankruptcy where the alleged bankrupt failed to comply with orders for the amendment of pleadings, or to appear in response to an order to show cause.—Young & Holland Co. v. Brande Bros., U. S. C. C. of App., First Circuit, 162 Fed. Rep. 663.

16.——Jurisdiction.—A District Court as a court of bankruptcy has jurisdiction of a suit in equity by a trustee in bankruptcy of a corporation against a number of defendants to recover unpaid subscriptions to the stock of the corporation; such suit being one which could not have been maintained by the bankrupt.—Skillin v. Magnus, U. S. D. C., N. D. N. Y., 162 Fed. Rep. 689.

17.——Preferences.—Release of a bankrupt's right of redemption from a deed to land which was in fact a mortgage, where the value of the land was less than the amount of the debt, held not to create a fraudulent preference.—Sears v. Gilman, Mass., 85 N. E. Rep. 466.

18.——Provable Debts.—A note given by a bankrupt corporation to a stockholder for money borrowed with which to effect a composition, and which was so used, is not without consider-

ation, and may be proved as a debt in a second bankruptcy proceeding.—In re C. H. Bennett Shoe Co., U. S. D. C., D. Conn., 162 Fed. Rep. 691.

19.——Questions Not Raised at Trial.—The capacity of a bankrupt's trustee to sue, not having been challenged in the trial court, cannot be raised on appeal.—Knapp v. Milwaukee Trust Co., U. S. C. C. of App., Seventh Circuit, 162 Fed. Rep. 675.

20.——Surcharging Account.—A receiver in bankruptcy held properly surcharged with the amount realized from the sale of fixtures of one of the bankrupt's places of business, but not for the value of supplies on hand, nor for the difference between the appraised and sale value of the fixtures in another place of business belonging to the estate.—In re Consumers' Coffee Co., U. S. D. C., E. D. Pa., 162 Fed. Rep. 786.

21. **Banks and Banking**—Forged Checks.—Where a party forging a check was a stranger to the drawee and the person receiving the money on the check, and they were equally innocent, the drawee must stand the loss.—Trust Co. of America v. Hamilton Bank of New York City, 112 N. Y. Supp. 84.

22. **Bills and Notes**—Bona Fide Purchaser of Forged Note.—Where the indorsement of the payee of a bill of exchange has been forged, subsequent holders obtain no title to it, and payments made to one holding under such forged indorsement may be recovered.—Trust Co. of North America v. Hamilton Bank of New York City, 112 N. Y. Supp. 84.

23.——Notice of Dishonor.—An owner of a note who has placed the same with another for collection held not bound either to personally notify the indorser of dishonor, or to make inquiries as to where the indorser received his mail.—Vogel v. Starr, Mo., 112 S. W. Rep. 27.

24. **Boundaries**—Establishment.—Where a lost corner cannot be definitely established by other means, the original location, as shown by surveys based on other established corners of the same original survey, should control.—Leathers v. Oberlander, Iowa, 117 N. W. Rep. 30.

25. **Carriers**—Contributory Negligence.—In an action for injury to a passenger caused by a jerking of a caboose, whether she was guilty of contributory negligence in going out on the back platform held for the jury.—St. Louis, I. M. & S. Ry. Co. v. Richardson, Ark., 112 S. W. Rep. 212.

26.——Emergency.—In the sudden and unexpected starting of a street car while a passenger is attempting to board, there is presented an emergency; an "emergency" being a sudden or unexpected happening or occasion calling for immediate action.—Burger v. Omaha & C. B. St. Ry. Co., Iowa, 117 N. W. Rep. 35.

27.——Liability as Warehouseman.—Where goods are delivered to a carrier not for immediate transportation, the carrier's liability is measured by the principles governing a depositary or bailee.—St. Louis, I. M. & S. Ry. Co. v. Citizens' Bank of Little Rock, Ark., 112 S. W. Rep. 154.

28. **Chattel Mortgages**—Seizure of Intermingled Logs.—Where a mortgagee of logs seized the mortgaged logs and others belonging to another, it was not liable to the mortgagor or his assignee for any of its acts with reference to the logs not mortgaged.—Croze v. St. Mary's Canal Mineral Land Co., Mich., 117 N. W. Rep. 81.

29. **Compromise and Settlement**—Validity of Agreement.—Validity of contract of compromise by which disinherited heir promised not to contest will in consideration of sharing estate held not to depend upon showing that the disinherited heir had a fair chance of success in contesting the will.—Blount v. Dillaway, Mass., 85 N. E. Rep. 477.

30. **Constitutional Law** — Construction.—Where a statute or constitution, after having been construed, is re-enacted without material change, such construction becomes a part thereof.—Pittman v. Byars, Tex., 112 S. W. Rep. 102.

31.——Delegation of Legislative Powers.—Laws 1905, p. 408, c. 273, authorizing detachment of agricultural lands from villages, held unconstitutional as a delegation of legislative power to the courts.—In re Brenke, Minn., 117 N. W. Rep. 157.

32.——Due Process of Law.—Code Civ. Proc. Sec. 438, authorizing substituted service in an action against a foreign corporation, is not a violation of Const. U. S. Amend. 14, as not due process of law.—Grant v. Greene, 111 N. Y. Supp. 1089.

33.——Regulation of Insurance.—St. 1907, p. 895, c. 576, Sec. 75, held not unconstitutional as conferring on the insurance commissioner power to pass on forms of insurance policies to be issued in the state.—New York Life Ins. Co. v. Hardison, Mass., 85 N. E. Rep. 410.

34. **Contracts**—Breach of Contract.—Plaintiff, though declaring on a building contract, may recover only on the account annexed, and defendant not having been deprived of the protection and benefit of the contract, the amount recoverable is limited to the agreed price, after deducting payments and damages suffered because of plaintiff's breach.—Norcross Bros. Co. v. Vose, Mass., 85 N. E. Rep. 468.

35.——Stipulations in Building Contracts.—Where a remedy for the happening of a condition has been provided for in the contract, the presumption is that the parties intended the prescribed remedy as the sole remedy.—Goss v. Northern Pac. Hospital Assn. of Tacoma, Wash., 96 Pac. Rep. 1078.

36. **Corporations**—Articles of Incorporation.—Articles authorizing a corporation to engage in the business of rendering public service in the municipality do not authorize the corporation to use privileges and franchises that may be conferred by the municipality.—State v. Tampa Waterworks Co., Fla., 47 So. Rep. 358.

37.——Sale of Stock.—Where the seller of corporate stock guaranteed "that the liabilities of said" company "do not exceed by more than $100" a certain amount, he was liable thereon for the amount of the excess of liabilities over that set forth less $100.—Childs v. Krey, Mass., 85 N. E. Rep. 442.

38.——Unpaid Stock Subscription.—The unpaid subscriptions of corporate stock form a part of the assets of the corporation to which the holders of its bonds may look for satisfaction of their claims.—United States & Mexican Trust Co. v. Delaware Western Const. Co., Tex., 112 S. W. Rep. 447.

39. **Costs**—Tender.—A justice's docket held to show a valid tender so that on plaintiff's failure to recover more than the sum tendered on an appeal to the circuit court costs should have been taxed against him.—Shafstall v. Downey, Ark., 112 S. W. Rep. 176.

40. **Counties**—Liability for Torts.—A county is not liable for the tortious acts of its officers even when engaged in the performance of their

duties, unless made so by statute.—Talbott v. Board of Com'rs. of St. Joseph County, Ind., 85 N. E. Rep. 376.

41. **Courts**—Priority of Jurisdiction.—A federal court of equity which has acquired jurisdiction to administer the property of an insolvent corporation by taking possession of the same by its receivers in an appropriate suit is not deprived of such jurisdiction by a subsequent dissolution of the judgment of a state court.—Robinson v. Mutual Reserve Life Ins. Co., U. S. C. C., S. D. N. Y., 162 Fed. Rep. 794.

42.——Transitory Actions.—The courts of New York are open to all suitors, and will enforce transitory rights of action where the liability asserted is recognized by the common law, is contractual in its nature, and is not violative of the state's public policy.—Hutchinson v. Ward, N. Y., 85 N. E. Rep. 890.

43. **Criminal Law**—Res Gestae.—In a prosecution for perjury in support of W.'s homestead claim, declarations of W. indicating nonresidence during the time defendant testified W. continuously resided on the homestead was admissible as res gestae.—Barnard v. United States, U. S. C. C. of App., Ninth Circuit, 162 Fed. Rep. 618.

44. **Criminal Trial**—Degree of Offense.—Where a person is acquitted of a higher grade of an offense, such acquittal only bars a subsequent conviction for the degree of the offense for which he was acquitted on any higher grade.—Burnett v. State, Tex., 112 S. W. Rep. 74.

45. **Curtesy**—Equity of Redemption.—A husband has curtesy of trust as well as of legal estates and of an equity of redemption in mortgaged premises.—Jackson v. Becktold Printing and Book Mfg. Co., Ark., 112 S. W. Rep. 161.

46. **Damages**—Action for Breach.—In an action for breach of defendant's contract to furnish plaintiff with motive power to operate his threshing machine during the season, testimony as to what plaintiff would have earned if he had been furnished power as agreed held admissible under the allegations of the complaint.—Hoskins v. Scott, Or., 96 Pac. Rep. 1112.

47.——Punitive Damages.—The element of willfulness or conscious indifference to consequences from which malice may be inferred is necessary to sustain an action for punitive damages.—St. Louis Southwestern Ry. Co. v. Myzell, Ark., 112 S. W. Rep. 203.

48. **Dedication**—Reversion.—Where land has been dedicated to the public for cemetery purposes, if there be an abandonment of the graveyard, the right of the public, which is in the nature of an easement, ceases, and the land reverts to the original owner or his grantees.—Tracy v. Bittle, Mo., 112 S. W. Rep. 45.

49. **Dismissal and Nonsuit**—Setting Aside Dismissal.—The court has the power to review the action of the clerk in entering a dismissal, and if plaintiff was not in default in serving a copy of the cause of action the court may vacate the order of dismissal and reinstate the cause.—Poppell v. Culpepper, Fla., 41 So. Rep. 351.

50. **Divorce**—Custody of Children.—A judgment of divorce awarding to the wife the custody of the children held a mere judicial determination that she shall have the preference legal right to their custody.—Sykes v. Speer, Tex., 112 S. W. Rep. 422.

51.——Desertion.—It is essential to desertion as a ground for divorce that the deserted one has not acquiesced in the separation and that it is against his sincere desire.—Luper v. Luper, Or., 96 Pac. Rep. 1099.

52.——Disposition of Property.—A married woman abandoned by her husband held entitled to acquire a domicile elsewhere than in the state where their domicile was at the time of her abandonment and obtain a divorce in the courts of such new domicile.—Buckley v. Buckley, Wash., 96 Pac. Rep. 1079.

53.——Homestead.—The duty of a husband to support his children, notwithstanding a divorce awarding to the wife the custody of the children, held to constitute the husband and children, when living together, a family entitled to a homestead.—Sykes v. Speer, Tex., 112 S. W. Rep. 422.

54. **Ejectment**—Defenses.—A landowner who stands by and sees a railroad constructed on his land by a company having the power of eminent domain without preventing the construction acquiesces therein and cannot recover the land in ejectment.—Union Sawmill Co. v. Felsenthal Land & Townsite Co., Ark., 112 S. W. Rep. 205.

55. **Eminent Domain**—Injury to Surrounding Land.—The use of soft coal in a municipal pumping plant, to the serious injury to property in the neighborhood, held to constitute an appropriation of such property for which the owners thereof may recover damages.—Gordon v. Village of Silver Creek, 112 N. Y. Supp. 54.

56. **Equity**—Scope of Review.—Where a master properly itemized his claim for taking testimony, but made a further claim for "hearing arguments and examining questions in issue and reporting conclusions thereon," the latter claim was improperly allowed, in that it failed to show the time necessarily employed.—Wirzbicky v. Dranicki, Ill., 85 N. E. Rep. 396.

57. **Estoppel**—Bills and Notes.—In an action by a wife for conversion of a note, payable to her and transferred by her husband without her authority, held, that she was not estopped to claim the note.—McMahon v. Welsh, Mo., 112 S. W. Rep. 43.

58. **Evidence**—Speed of Automobile.—Where a witness noticed the speed of an automobile when about one hundred feet from the place where it collided with a bicyclist, his testimony that it was then going at a lively gait was not incompetent on the question of the speed of the automobile at the place of collision.—Olsen v. Levy, Cal., 97 Pac. Rep. 76.

59.——Value of Property.—Upon the question as to the value of certain property, an expert witness whose business was determining the value of similar property, and trading in it, could be examined as to values by hypothetical questions, though he never saw the particular property.—Ross v. Schrieves, Mass., 85 N. E. Rep. 468.

60. **Execution**—Validity of Sale.—The failure of an execution to state correctly the amount of the judgment and the costs is an irregularity which may justify the setting aside of the sale when sought in a direct action for that purpose, but does not render the sale void, and it cannot be attacked collaterally.—Sykes v. Speer, Tex., 112 S. W. Rep. 422.

61. **Executors and Administrators**—Settlement of Claims.—At common law an executor and administrator has absolute power of disposal of the personal effects of decedent and

may compromise any claim.—Olston v. Oregon Water Power & Ry. Co., Or., 96 Pac. Rep. 1095.

62. **Fraud**—Evidence.—Where, in an action for fraud, there was no proof that the representations made were not literally true, or that stock for which certain notes were given was not worth its face value or that the notes were misapplied, plaintiff could not recover.—Sheets v. Christie, Iowa, 117 N. W. Rep. 29.

63.——Means of Knowledge of Parties.—The rule that mere false assertions as to the value of property, where no warranty is intended, does not constitute actionable fraud, does not apply where the parties have not equal opportunities to form and exercise their own judgment.—Fall v. Hornbeck, Mo., 112 S. W. Rep. 41.

64. **Habeas Corpus**—Conclusiveness.—A judgment on first application for habeas corpus to obtain custody of a child held not res judicata of a second application where there has been a material change of facts.—Pittman v. Byars, Tex., 112 S. W. Rep. 102.

65. **Homicide**—Communicated Threats.—If threats alleged to have been made by one person against another are communicated to the other, though not true, and he believes them and that the person made them, he will be justified in acting the same as if they had been in fact made.—Huddleston v. State, Tex., 112 S. W. Rep. 64.

66.——Dying Declarations.—To render a statement of a decedent competent as dying declaration, it is not necessary to show that he expressed a belief in the near approach of death, where his condition of mind is made apparent from his conduct and surrounding circumstances.—State v. Ju Nun, Or., 97 Pac. Rep. 96.

67. **Husband and Wife**—Community Property.—Where community property was used as a lodging house, the fact that the wife was attending to the business, with the approval of the husband, did not confer on her the power to sell the furniture or rent the premises.—Travers v. Barrett, Nev., 97 Pac. Rep. 126.

68. **Indictment and Information**—Joinder of Offenses.—Where a crime may be committed by the doing of several acts in the alternative, they may all be included in one count, and a conviction had on proof of the commission of any one, without proof of the commission of the others.—People v. Schlessel, 112 N. Y. Supp. 45.

69. **Internal Revenue**—Liquor Dealers.—Each member of a so-called "Locker Club," illegally licensed by a municipal corporation in Georgia, and which in fact sells or furnishes liquors to its members in violation of the prohibition law of the state, is a retail liquor dealer within the meaning of the internal revenue law, and subject to the penalty for its violation.—In re Charge to Grand Jury, U. S. D. C., S. D. Ga., 162 Fed. Rep. 736.

70. **Interstate Commerce**—Original Packages.—Where the original packages containing dairy products consisting of interstate shipments are broken, and the products are sold in different packages from those in which they were shipped into the state, the transactions are changed from interstate to intrastate commerce, and become subject to state laws.—City of St. Louis v. Wortman, Mo., 112 S. W. Rep. 520.

71. **Intoxicating Liquors**—Civil Damage Laws.—Whether person to whom liquor was sold in violation of civil damage laws was intoxicated at the time he committed suicide held immaterial, where the sale was the cause of suicide.—Palmer v. Schurz, S. D., 117 N. W. Rep. 150.

72.——Illegal Contracts.—The price of intoxicating liquors held not recoverable where the liquors were sold to be retailed in violation of law.—Dallas Brewery v. Holmes Bros., Tex., 112 S. W. Rep. 122.

73. **Judgment**—Conclusiveness.—A judgment of the circuit court affirming a probate judgment adjudging a guardian to be indebted to his ward cannot be attacked collaterally on his appeal from a judgment on his bond superseding the probate judgment.—Hands v. Haughland, Ark., 112 S. W. Rep. 134.

74. **Landlord and Tenant**—Agreement by Lessor.—Where a lease was given for a term with the privilege of renewal, the lessee having power to sublet, if the lessor joined in a sublease of a part of the premises with privilege to the subtenant of renewal, the sublease could be enforced against the lessor and his successor in interest.—Marino v. William, Neb., 96 Pac. Rep. 1073.

75.——Right to Sue For Rent.—A landlord's warranty deed assigns whatever right he has as landlord in the letting of the premises, and if the tenant continues to occupy under the tenancy the grantee may sue for the rent under the original letting.—Starbuck v. Avery, Mo., 112 S. W. Rep. 33.

76. **Libel and Slander**—Privileged Communications.—The headlines of a newspaper publication of the report of judicial or quasi judicial proceedings are not a part of the proceedings, but are the voluntary statements of the publisher.—Brown v. Globe Printing Co., Mo., 112 S. W. Rep. 462.

77.——Reports of Legal Proceedings.—A publication of privileged words of comment in a legal proceeding held not privileged.—Brown v. Publishers: George Knapp & Co., Mo., 112 S. W. Rep. 474.

78. **Limitation of Actions**—Accrual of Right of Action.—Limitations do not run against warrants issued by a municipal corporation payable out of a special fund to be created until the fund has been created, and there is money in it with which to pay the warrants.—Rogers v. City of Omaha, Neb., 117 N. W. Rep. 119.

79.——Defenses.—If a limitation merely affects the remedy, it must be pleaded in the answer, but, if it is a condition of plaintiff's right of action, defendant may take advantage of a failure to plead compliance to do so under a general denial.—McRae v. New York, N. H. & H. R. Co., Mass., 85 N. E. Rep. 425.

80. **Marriage**—What Constitutes.—A cohabitation illicit in its origin is presumed to be of that character unless the contrary is proved, and cannot be transferred into matrimony by evidence falling short of establishing the fact of an actual contract of marriage.—Compton v. Benham, Ind., 85 N. E. Rep. 365.

81. **Master and Servant**—Assumed Risk.—A switchman continuing to work for about a year with knowledge of defect in the roadbed held to have assumed the risk in the absence of a promise to repair.—St. Louis, I. M. & S. Ry. Co. v. Mangan, Ark., 112 S. W. Rep. 168.

82.——Defective Machinery.—A servant thoroughly experienced in the work, who continues to operate a defective machine, without promise on the part of the master of guaranty against injury or of mending the machine, assumes the risk, where he has full knowledge of the defect and of its effect on the operation of the machine.—Continental Oil & Cotton Co. v. Scott, Tex., 112 S. W. Rep. 107.

83.——Fellow Servants.—Where the hook tender who attached hooks for the purpose of raising the log which fell on plaintiff, and the operator of the crane by which it was raised, were mere operatives, charged with the performance of no positive duty which the master owed to plaintiff, they were fellow servants of plaintiff, for whose negligence the master was not liable.—Allen v. Standard Box & Lumber Co., Or., 96 Pac. Rep. 1109.

84.——Fellow Servants.—A telegraph operator in charge of a block signal, and in absolute control of the operation of trains within such block, held a vice principal, and not a fellow servant, of a trainman killed in a collision due to the operator's negligence in permitting a train to proceed while the block was occupied.—Salmons v. Norfolk & W. Ry. Co., U. S. C. C., S. D. W. Va., 162 Fed. Rep. 722.

85.——Fellow Servants.—In an action for injuries to a servant by negligence of a fellow servant, plaintiff must prove that the fellow servant was incompetent, that the injury was caused thereby, and that the master, with notice of the incompetency, negligently retained the servant.—Tucker v. Missouri & K. Telephone Co., Mo., 112 S. W. Rep. 6.

86.——Injury to Servant.—A lumber company operating a logging road held required to maintain reasonably safe appliances for the protection of its servants.—Cavaness v. Morgan Lumber Co., Wash., 96 Pac. Rep. 1084.

87.——"Res Ipsa Loquitur."—The rule that the maxim, "Res ipsa loquitur," does not apply to cases between master and servant, does not prevent the establishment of a master's negligence by the circumstances surrounding the accident.—Reed v. Norfolk & W. Ry. Co., U. S. C. C., S. D. W. Va, 162 Fed. Rep. 750.

88. **Mechanic's Liens**—Right to Lien.—Mere expectation, permission, knowledge, or acquiescence by a vendor in the act of a vendee in possession in improving the property held insufficient to charge the vendor's interest with a materialman's lien for materials furnished the vendee under Comp. Laws, 1907, Sec. 1372.—Belnap v. Condon, Utah, 97 Pac. Rep. 111.

89. **Mines and Minerals**—Construction of Oil Lease.—An oil lessee, having an exclusive right to explore for and remove oil from the leased premises, has a right of action to recover damages against one who without his consent enters upon the premises and removes oil therefrom during his term.—Backer v. Penn Lubricating Co., U. S. C. C. of App., Sixth Circuit, 162 Fed. Rep. 627.

90.——Fixtures.—Buildings, machinery, etc., constructed on land leased for mining, held not fixtures, but removable by the lessees, subject to landlord's lien for unpaid royalty.—Cherokee Const. Co. v. Bishop, Ark., 112 S. W. Rep. 189.

91. **Mortgages**—Partial Release.—A mortgagee who, having actual knowledge of a subsequent lien against parcels of the mortgaged premises, releases other parcels, held to discharge the parcels, subject to such junior lien, wholly or partly, from liability under the mortgage.—Schaad v. Robinson, Wash., 97 Pac. Rep. 104.

92. **Municipal Corporations**—Contracts for Public Service.—Municipal contract for public service will be sustained where the power is given to make the contract, and the terms of it taken with the law controlling it are not clearly violative of some provision of law.—State v. Tampa Waterworks Co., Fla., 47 So. Rep. 358.

93.——General Powers.—General powers given to a municipality should be construed with reference to the purpose of its incorporation, and the general grant of powers includes all powers fairly within the terms of the grant and essential to the purpose of municipality.—State v. Tampa Waterworks Co., Fla., 47 So. Rep. 358.

94.——Ordinances.—The ordinances of the city of St. Louis, in order to be valid, must be consistent with the general laws of the state and must be in harmony with the legislative policy of the state, manifested by its general enactments and as provided for in express terms by the Constitution.—City of St. Louis v. Klausmeier, Mo., 112 S. W. Rep. 516.

95.——Power to Make Improvements.—The proposition adopted by the voters of a village as to the construction of a sewer system, held to authorize the village trustees to raise by taxation a certain sum for the construction of the system.—Mead v. Turner, 112 N. Y. Supp. 127.

96.——Repeal of Ordinance.—The repeal of a city ordinance pending a prosecution under its provisions operates to relieve the defendant, unless it is otherwise provided in the act repealing the ordinance.—City of St. Louis v. Wortman, Mo., 112 S. W. Rep. 520.

97. **Navigable Waters**—State Control of Lands Under Waters.—The state cannot abdicate general control over the lands under navigable waters within the state.—State v. Gerbing, Fla., 47 So. Rep. 353.

98. **Nuisance**—Acquisition of Rights by Prescription.—One who owned and lived on land before it was injured by a nuisance held entitled to recover, though the residence on the property was erected after the nuisance came into being.—Gordon v. Village of Silver Creek, 112 N. Y. Supp. 54.

99.——Injunction.—Where a doubt arises as to the right of plaintiff to maintain a suit or as to the existence of the nuisance complained of, equity will not interefere until the questions are setttled by a judgment at law.—Van Buskirk v. Bond, Or., 96 Pac. Rep. 1103.

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103. **Principal and Agent**—Authority of Agent.—A conductor held to possess implied authority to employ a surgeon to treat a person struck by a train.—Bonnette v. St. Louis, I. M. & S. Ry. Co., Ark., 112 S. W. Rep. 220.

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der a conveyance executed by a purported agent must show that the agent was authorized by the owner; and the mere acting of one under the claim that he is an agent does not prove his authority.—Travers v. Barrett, Nev., 97 Pac. Rep. 126.

105. **Public Lands**—Cutting Timber.—A company obtaining lumber from government land through a fraudulent scheme with an individual to enter on it as a homestead held liable for the full value of the lumber received.—United States v. Flint Lumber Co., Ark., 112 S. W. Rep. 217.

106. **Railroads**—Conditions Printed on Ticket. —Where a passenger's ticket contained on its face nearly two quarto pages of printed provisions, the holder of the ticket was bound to have it read to her, if she could not read it herself.—French v. Merchants' & Miners' Transp. Co., Mass., 85 N. E. Rep. 424.

107.——Contributory Negligence.—An adult person who voluntarily left a railroad car in which he was riding several blocks before reaching a station, and stood upon the open platform, where he was killed in a collision, no one inside the cars being seriously injured, held chargeable with contributory negligence which precluded a recovery for his death.—Chicago Great Western Ry. Co. v. Mohaupt, U. S. C. C. of App., Eighth Circuit, 162 Fed. Rep. 665.

108.——Effect of Appointment of Receiver.—The appointment of a receiver of a railroad company held not to dissolve the company nor to hinder the exercise of corporate functions except those involved in the management of the property by the receiver.—United States & Mexican Trust Co. v. Delaware Western Const. Co., Tex., 112 S. W. Rep. 447.

109. **Release**—Fraud.—At common law a release cannot be questioned in an action at law except for fraud affecting its execution, and for fraudulent representations affecting the consideration equity alone can give relief.—Olston v. Oregon Water Power & Ry. Co., Or., 96 Pac. Rep. 1095.

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111. **Sales**—Conditional Sales.—Where an alleged sale with reservation of title until payment is not admitted by the alleged buyer, the burden of proving a continuance of the indebtedness is on the seller.—Black v. Roberson, Ark., 112 S. W. Rep. 402.

112.——Time for Delivery.—Acquiescence by a buyer in the delay of a seller in manufacturing the article and making the same ready for shipment operates as an extension of the time for delivery.—Tidwell v. Southern Engine & Boiler Works, Ark., 112 S. W. Rep. 152.

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117. **Vendor and Purchaser** — Purchaser's Right to Possession.—A contract reciting that the owner of premises had received of a person $100 as a deposit on the purchase price, $2,500 balance to be paid upon the delivery of an unlimited certificate of title, does not confer a right of possession upon the person.—Winchester v. Becker, Cal., 97 Pac. Rep. 74.

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121.——Construction.—Will construed, and share of son of testator dying without issue after death of brother and sister leaving issue held to go to surviving children of testator and not to the grand-children.—Davies v. Davies, 112 N. Y. Supp. 157.

122.——Contest.—In proceedings by a son to contest the will of his father, one of the questions being as to whether testator's belief that contestant was illegitimate was an insane delusion, the chastity of testator's wife—contestant's mother—was in issue, and evidence of her chaste reputation was admissible.—O'Dell v. Goff, Mich., 117 N. W. Rep. 59.

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